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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ENRIQUE MEDINA CASTRO, Defendant and Appellant.	F043351 (Super. Ct. No. AF005582A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Roger D. Randall, Judge.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Robert P. Whitlock and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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Luis Enrique Medina Castro (appellant) was convicted of one count of making a criminal threat (Pen. Code, § 422)[1] and one count of exhibiting a deadly weapon in a menacing manner (§ 417, subd. (a)(1)). The jury was unable to reach a verdict on an

[1]All further statutory references will be to the Penal Code unless otherwise stated.

additional count of making a criminal threat, and that count was dismissed on motion of the district attorney. Appellant admitted a prior prison term allegation. He was sentenced to a total term of three years in state prison.

On appeal, appellant contends the trial court erred when it denied his motion to sever the charges in count 1 from those in counts 2 and 3. He further contends the trial court erred in allowing the introduction of certain evidence, and he claims instructional error. We disagree with appellant's contentions and affirm.

FACTS

One day, appellant told his wife, Alicia Flores, that he had a machete in his truck. Ms. Flores never saw the machete, but did see in the trashcan a piece of cardboard packaging which had the word "machete" on it. After appellant told her about the machete, Ms. Flores was in fear for her life and the lives of her children.

A few days later, in the morning, appellant yelled at Ms. Flores and left the apartment. She called the police, explaining that appellant was angry and had stated he had photographs of her lovers. She did not know what appellant was talking about as the photographs were of horses.

Appellant returned in the early afternoon and told his wife he was going to kill her. When he left, she again called the police, telling them appellant had threatened to cut her head off "if [she] was involved." In the evening, Flores took her children to a women's shelter and did not tell appellant where she went.[2]

The following day, Damaris Zubia was sitting on a bench outside the barbershop where she worked. Two female employees from an adjacent market were sitting with her. Zubia noticed a truck parked on the street. She was then approached by appellant, who pointed at her and told her that his family and children were in danger. Zubia went

[2]The above facts were the basis of a count on which the jury was unable to reach a verdict. The count was dismissed. The events are repeated here because it is necessary to a consideration of one of appellant's contentions.

into the shop to talk to a customer who had two children, thinking appellant might be related to them.

Once in the shop, Zubia told her coworkers that a man outside had said his wife and children were inside the shop. She also told a coworker, Alberta Gomez, to call the police as the man was desperate and she did not know what was wrong with him.

Appellant then entered the shop and told Zubia and the other employees that they had his family and they needed to tell him where they were. The owner of the shop asked one of the female customers if she was appellant's wife, but she stated, "No."

Zubia could see appellant had something in his hand covered by a handkerchief. She thought at first that it was a gun. Appellant then hit the counter hard with a machete and told the employees he would cut off their heads with the machete if they were hiding something. Several employees were afraid that appellant was going to kill them. He then left the shop. An employee locked the door and another called the police.

Zubia saw appellant get into his truck and drive around the parking lot. When several people left the shop through the back door, appellant drove to the back of the shop. The owner of the shop locked the back door, but she heard someone trying the door knob. Appellant was stopped by a security guard from a nearby market. The security guard noticed appellant had a knife in his hand. He showed appellant his gun and told him to stop. Appellant complied, and the guard detained him until police arrived.

Appellant was placed into the back of a patrol car. Deputy Sheriff Alfred Juarez searched appellant's truck and found a large machete with a blue handkerchief on the front seat. Deputy Juarez spoke to several employees of the shop. They were crying and appeared to be extremely distraught.

Appellant testified on his own behalf, claiming the arguments with his wife never happened and he never threatened her. He claimed that he saw his wife in the midafternoon on the day in question and that he then left. When he returned home, and his family was not in the apartment, he was not concerned.

The following day, he was driving around when a man whom he did not know told him his children were inside a beauty shop and were in danger. He first went to the Sheriff's Department to report this but found the office closed. He then went to the barber shop and took his machete with him, as he thought he might be in danger. He asked the shop employees where his children were. He denied raising the machete or threatening anyone.

After he left the shop, appellant saw a man and child leave the shop through the back door. Thinking it might be his child, he drove around to the other side. He did not go back into the shop, but was stopped and arrested.

DISCUSSION

1. Motion to sever

Appellant was originally charged in two separate cases because the alleged threats to Flores and the threats to the barbershop employees occurred in two different law enforcement jurisdictions. A motion was made for consolidation, which was granted. Appellant was then charged in an amended consolidated information with making criminal threats to Flores (count 1), and making criminal threats and exhibiting a deadly weapon to the employees of the shop (counts 2 & 3). Prior to trial, appellant filed a motion asking the court to exercise its discretion and sever the trial of count 1 from the trial of counts 2 and 3, which was denied. Appellant claims the trial court erred in denying the motion to sever "because the joint trial on these counts prejudiced appellant's constitutional right to a fair trial."

Section 954 provides for joinder of "two or more different offenses connected together in their commission … or two or more different offenses of the same class of crimes or offenses …." The offenses need not relate to the same transaction, and they may be committed at different times and places and against different victims if linked by a """common element of substantial importance."""" (*People v. Mendoza* (2000) 24 Cal.4th 130, 160, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 276.) Appellant acknowledges that the offenses fall within the same class, arguably meeting the threshold

requirements for joinder under section 954, but contends severance was required because joinder was so prejudicial that it deprived him of a fair trial. We disagree.

"Severance may … be *constitutionally* required if joinder of the offenses would be so prejudicial that it would deny a defendant a fair trial." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243-1244.) "We review the denial of a motion to sever under an abuse of discretion standard, assessing the trial court's exercise of discretion 'in light of the showings *then* made and the facts *then* known. [Citations.]' [Citation.]" (*Id.* at p. 1244.) Appellant must make "a clear showing of prejudice to establish that the trial court abused its discretion in denying [his] severance motion. [Citations.]" (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 160-161.)

Factors to consider in assessing the ruling include: whether the evidence of the crimes would or would not be cross-admissible in separate trials; whether some of the charges would likely inflame the jury; whether a weak case was joined with a strong case so that a "spillover" effect from the aggregate evidence might affect the outcome; and whether any of the joined charges was a capital crime. (*People v. Musselwhite*, *supra*, 17 Cal.4th at p. 1244.) A determination that evidence is cross-admissible "ordinarily dispels any inference of prejudice," but "the absence of cross-admissibility, by itself," is not sufficient to demonstrate prejudice. (*People v. Mason* (1991) 52 Cal.3d 909, 934.)

Appellant first contends there was "no connection whatsoever between the incidents in count 1 and counts 2 and 3," resulting in prejudice from the refusal to sever. According to appellant, the incidents were different and dissimilar because the incident with his wife did not involve the machete—he had not threatened to use it on her and she had not been in fear when appellant earlier mentioned he had a machete in his truck—and because the victims in counts 2 and 3 were complete strangers.

Appellant's claim that his case is similar to that in *Walker v. Superior Court* (1974) 37 Cal.App.3d 938 is unpersuasive. In *Walker*, the defendant was charged with a robbery involving three men carrying pistols and one rifle. The defendant was linked to the robbery by fingerprints found on an envelope at the bank. Over three months later,

the defendant was arrested for possession of a concealable firearm. (*Id.* at pp. 940-941.) The trial court denied the defendant's motion to sever the two counts. (*Id.* at p. 940.) Noting there was no indication that the weapon found was the same one used in the robbery, the Court of Appeal held that the trial court had abused its discretion in its refusal to grant a motion to sever. (*Id.* at pp. 941, 943.) The court stated, "[W]here two dissimilar offenses occur a significant period of time apart, are connected only by an otherwise unidentified weapon, and proof of one charge involves potentially prejudicial and otherwise inadmissible evidence on the second charge, the refusal to grant a motion to sever the charges is an abuse of discretion." (*Id.* at p. 943.)

Here, at the hearing on the motion to sever the counts, the prosecutor "anticipated" that the facts at trial would be that appellant told Flores he had a machete and he was going to use it to kill everyone. Flores had seen a packaging label for a 22-inch machete, which appellant had purchased. She expressed fear for herself and her children. Several days later, appellant became angry with her and threatened to kill her and cut off her head if she was "involved." The following day, appellant went into a barbershop, yelled that he knew his wife and children were hiding there, displayed the machete, struck the machete on the counter, and then told the employees that if they did not have information about his wife and children he would cut off their heads.

Consideration of this evidence demonstrates that the alleged offenses were similar in nature: they involved similar threats, they occurred within days of each other, and, despite appellant's claim to the contrary, were connected by a weapon, a machete. "[J]oinder is generally proper where a specific weapon is common to more than one crime." (*Walker v. Superior Court*, *supra*, 37 Cal.App.3d at p. 942.) Granted, the use or presence of a weapon is not a necessary element of a criminal threat.[3] The presence of the machete, however, no doubt gave the verbal threats added weight to the victims.

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[3]Section 422 provides in pertinent part: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement … is to be taken as a threat, even if there is no intent of actually carrying it

Appellant further contends the trial court erred in denying his motion to sever because "the prejudicial 'spill-over' effect of evidence relating to count 1 was obvious." As argued by appellant:

> "Due to the introduction of evidence regarding appellant making criminal threats to his wife from January 29th through January 31st and mentioning to her on January 29th he had a machete, appellant was cast as a depraved machete-carrying criminal who was capable of committing the charged offenses in counts 2 and 3. The improper 'spill-over' effect improperly allowed the prosecutor to bolster the stronger case on counts 2 and 3 with the weaker case on count 1."

There is no indication, however, that joinder caused appellant prejudice. The guilty verdicts in counts 2 and 3 had ample evidentiary support. Four employees who were inside the barbershop at the time appellant threatened to cut off their heads testified at trial. Each gave a similar account of the incident. In addition, the jury was unable to reach a verdict on count 1, casting further doubt on appellant's claim that he was convicted of counts 2 and 3 due to evidence relating to count 1.

There is no indication that joinder was unfairly prejudicial to appellant, and the trial court was within its discretion in denying the motion to sever.

2. Relevant evidence

Prior to trial, the prosecutor stated she intended to introduce evidence of appellant's statements that he had a machete in his truck and was going to use it "to kill the doctor, the judge, et cetera," made two days before his verbal threat to Flores. The prosecutor also intended to introduce evidence that Flores had seen a packaging label for a machete, to show that she was in fear for her life. Defense counsel objected, claiming the statements were irrelevant and had nothing to do with the subsequent threat.

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out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety …."

The trial court ruled that testimony of appellant's statements that he was going to kill the doctor and judge were not admissible; the facts that Flores saw the machete label, however, and that appellant told her he had a machete in his truck, were admissible, because they were relevant to the victim's fear.

At trial, Flores testified that appellant told her two days prior to threatening her that he had a machete in his truck and that she had seen at the house packaging material from the purchase of a machete. She testified that, after appellant told her about the machete, she was in fear for her life and the lives of her children.

On appeal, appellant argues "there is no conceivable reason why evidence regarding appellant's reference to the machete [two days] prior to the criminal threats appellant allegedly made to [Flores] … and the criminal threats appellant allegedly made to the employees of [the barbershop] … had any tendency or reason to prove or disprove any disputed fact …." He further contends that if the evidence was relevant, it should have been excluded under Evidence Code section 352 as more prejudicial than probative. We disagree.

> Only relevant evidence is admissible. (Evid. Code, § 350.)
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> "'[A]ll relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."'" (*People v. Heard* (2003) 31 Cal.4th 946, 973.)

"The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 14.)

Appellant was charged with making criminal threats (§ 422) and the jury was instructed pursuant to CALJIC No. 9.94 (2002 Re-revision) that in order to prove the crime, the following elements must be proved:

> "1. A person willfully threatened to commit a crime which, if committed, would result in death or great bodily injury to another person; [¶] 2. The

> person who made the threat did so with the specific intent that the statement be taken as a threat; [¶] 3. The threat was contained in a statement that was made verbally, in writing, or by means of an electronic communication device; [¶] 4. The threatening statement on its face, and under the circumstances in which it was made, was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; and [¶] 5. The threatening statement caused the person threatened reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety."

Evidence that appellant had a machete was relevant to show appellant's wife suffered reasonable and sustained fear when appellant threatened to kill her by cutting off her head.

In *People v. Garrett* (1994) 30 Cal.App.4th 962, the defendant was charged with making a criminal threat under section 422 after he threatened his wife over the telephone, saying he would put a bullet in her head. (*Garrett*, at p. 965.) The wife knew the defendant had a violent history and that he had a gun which he kept at his house. (*Ibid.*) Prior to trial, the defendant sought to exclude evidence that his wife was aware of his prior conviction for manslaughter and violent history, claiming the evidence was irrelevant. (*Id.* at p. 966.) The court disagreed, finding that the wife's knowledge that her husband had killed a man with a gun in the past was "extremely relevant and probative" on the elements of section 422. (*Garrett*, *supra*, at p. 967.)

Appellant further claims the evidence was more prejudicial than probative, as well as cumulative, and should have been excluded under Evidence Code section 352. However, at no time below did defense counsel raise this issue. It is axiomatic that, in order to preserve an objection for appellate review, objection on the same ground must be made at trial. (Evid. Code, § 353, subd. (a); *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014.) Defense counsel's trial objection on the grounds of relevance did not preserve an Evidence Code section 352 claim. Since specific and timely objection was not made below, the point is waived on appeal. (*People v. Kirkpatrick*, *supra*, at p. 1015; see also *People v. Williams* (1997) 16 Cal.4th 153, 250.)

In any event, the Evidence Code section 352 balance in this case would weigh against finding error. The jury heard testimony on counts 2 and 3 from four barbershop employees, each of whom gave a similar account of the incident. The jury was told a machete was found in appellant's vehicle, outside the shop. That the jury also heard that appellant possessed a machete some days earlier could have made no difference to the verdict.

3. CALJIC No. 2.21.2

Appellant contends the trial court erred in giving CALJIC No. 2.21.2.[4] He asserts that the jury could only have interpreted the instruction as applying to his exculpatory testimony, and that giving the instruction was thus a violation of his constitutional right to trial by jury and due process by impacting the prosecution's burden of proof.

CALJIC No. 2.21.2 is a correct statement of law. (*People v. Beardslee* (1991) 53 Cal.3d 68, 94-95 [discussing former CALJIC No. 2.21, which is substantially identical to CALJIC No. 2.21.2]; *People v. Foster* (1995) 34 Cal.App.4th 766, 772.) "The instruction is phrased in neutral fashion and applies to witnesses called by either side." (*People v. Millwee* (1998) 18 Cal.4th 96, 159.)

Appellant relies on dicta in *People v. Lescallett* (1981) 123 Cal.App.3d 487, 493, which suggests the instruction should not be given where it might appear to be directed at the defendant's exculpatory testimony. We find this argument unpersuasive, noting again that the instruction applies equally to all witnesses. The instruction

> "'does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.' [Citation.] 'The weaknesses in [the defendant's] testimony should not be ignored or given preferential treatment not granted to the testimony of any other witness. As it has been aptly noted in other contexts, a defendant who elects to testify in his own behalf is not entitled to a false aura of veracity. [Citations.]'" (*People v.*

[4]The instruction read: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars."

Beardslee, *supra*, 53 Cal.3d at p. 95; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1502-1503.)

We also reject appellant's claim that the instruction "increase[d] [his] burden from that of raising a reasonable doubt of the sufficiency of the prosecution's evidence to one of affirmatively proving his defense." The instruction does not conflict with or lower the requirement of proof beyond a reasonable doubt. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1045.) "When CALJIC No. 2.21.2 is considered in context with CALJIC Nos. 1.01 (consider instructions as a whole) and 2.90 (burden of proof), 'the jury was adequately told to apply CALJIC No. 2.21.2 "only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt." [Citation.]' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 429.) There was no error in instructing the jury pursuant to CALJIC No. 2.21.2.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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CORNELL, J.